UNITED STATES OF AMERICA v. OMAR AHMED KHADR	**Defense Motion** for Appropriate Relief to Compel Production of Witnesses at Trial 23 July 2010

1. Timeliness: This motion is being filed within the timeframe established by the Military Judge.

2. Relief Sought: The defense moves for an order compelling the prosecution to produce certain witnesses in person at trial.

3. Burden and Standard of Proof: As the moving party, the defense bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. R.M.C. 905(c)(2)(A).

4. Facts:

On 22 June 2010, the defense submitted to the prosecution an updated request for production of witnesses at trial. Prior to this request, the prosecution and defense worked diligently to resolve witness issues without the need for a motion to compel. Unfortunately, the prosecution and defense have been unable to resolve the issue of production of the following witnesses at trial:

a. [redacted]: The prosecution has agreed to produce [redacted] via VTC. The defense objects to testimony of this witness at a trial before members via VTC. [redacted] is subject to the compulsory process of this military commission.

b. Interrogator #2: Interrogator #2 will testify that he was present at the initial, post-capture interrogation of Mr. Khadr and will testify about the conditions surrounding that interrogation. During that interrogation Interrogator #2 will state that he noted in his report that Mr. Khadr was on a stretcher, sedated and fatigued. This initial interrogation formed the basis for the subsequent interrogations performed by the FBI and will therefore assist the trier of fact in assessing the weight to be given to any statements deemed admissible.

c. Interrogator #1: The prosecution has agreed to produce Interrogator #1 via VTC. The defense objects to testimony of this witness at a trial before members via VTC. The prosecution intends to admit statements made by Mr. Khadr after Mr. Khadr had been interrogated by Interrogator #1. All of the prosecution witnesses regarding these statements will be made by witnesses at Guantanamo Bay, Cuba. Interrogator #1 should be present at Guantanamo Bay, Cuba, for in court testimony.

d. Mr. D C: The subject of D-100 and ordered produced for trial on 16 December 2008. Based on the Government's current refusal to produce this relevant and necessary witness, the defense requests this commission again order this witness be produced at Guantanamo Bay for trial. Mr. C will testify that his first contact with Mr. Khadr was in the hospital when he observed an interrogation of Mr. Khadr conducted by two or three other interrogators sometime between 29 July and 1 August 2002; that Mr. Khadr was on a stretcher and hooked up to a respirator and/or a heart monitor during the interrogation; and that he could tell Mr. Khadr was under stress during the interrogation due to the movement of the lines on the monitors. Mr. C will testify that Mr. Khadr was suffering from critical wounds during his detention; that the wounds in Mr. Khadr's chest were so large that one could fit a can of Copenhagen inside his chest; that Mr. Khadr was on a stretcher in the detention cell for quite some time and that it took Mr. Khadr a long time to recover from his wounds. Mr. C will testify that interrogators were told by their chain of command that there were black areas, which included "striking" a detainee, and white areas, which was "how the Germans treated us," and that they were to work in the gray area; that they were told to be creative in coming up with interrogation techniques in the gray zone; that the interrogators received little guidance from their JAG on which interrogation techniques and treatment were permissible; that the interrogators knew there was a chance they could be prosecuted for how they were treating the detainees and, for that reason, the number of interrogators in an interrogation was kept to a minimum. Mr. C will testify that stress positions were commonly used in Bagram and that forcing someone to sit up while confined to a stretcher would be an example of a stress position used in the BCP; that stress positions were generally used for a period of up to two hours at a time. Mr. C will testify that sleep deprivation was a common practice at the BCP. Mr. C will testify that the MPs would chain detainees' arms to the wall or ceiling or otherwise chain detainees to fixed objects for various periods of time as punishment for infractions; and that when the detainees were chained like this, ear muffs, goggles and a hood were often used. Mr. C will testify that interrogators flashed LED lights repeatedly in the eyes of detainees and that this was a technique that an ODA interrogation team taught them. Mr. C will testify that the fear-up harsh interrogation technique consisted of yelling and screaming and throwing things around the room. Mr. C will testify that the fear-up technique was a favorite method of Interrogator #1. Mr. C will testify that detainees in BCP cells could hear other detainees screaming from interrogation rooms.

e. Soldier #2: The subject of D-095 and ordered produced for trial on 16 December 2008. The prosecution offered to produce Soldiers #2, #3, and #7 if the defense withdraws its request for Soldier #5 and #8. We decline that offer and reassert our position that each witness is relevant and necessary for trial. Soldier #2 is expected to testify that he was present at the 27 July 2002 firefight; that he radioed information to OC-1 immediately before the assault element entered the compound to the effect that there was "movement" in the compound as reported by Soldier #7; that he entered the "alley" in the compound in which Mr. Khadr was found at the conclusion of the firefight; that Mr. Khadr was so covered in rubble that Soldier #2 inadvertently stood on top of him and thought he was standing on a "trap door" because the ground did not seem solid; that he bent down to move the brush away to see what was beneath him and discovered that he was standing on a person; and that Mr. Khadr appeared to be "acting dead."

f. Soldier #3: The subject of previous defense motions and hearings at which the prosecution agreed to produce for trial on 16 December 2008. The prosecution offered to produce Soldiers #2, #3, and #7 if the defense withdraws its request for Soldier #5 and #8. We

decline that offer and reassert our position that each witness is relevant and necessary for trial. Soldier # 3 is expected to testify that he was present at the 27 July 2002 firefight; that he entered the compound with the final assault element and saw one person in the back corner of the alcove (where the enemy combatants were later found) behind some debris before taking gunfire from a pistol; that after the pistol fired, there was a brief pause, then he heard someone shout "grenade" and then he heard the grenade explode. This testimony is not cumulative because this account differs from other members of the assault team who entered the compound.

g. Soldier #5: The subject of previous defense motions and hearings at which the prosecution agreed to produce for trial on 16 December 2008. The prosecution offered to produce Soldiers #2, #3, and #7 if the defense withdraws its request for Soldier #5 and #8. We decline that offer and reassert our position that each witness is relevant and necessary for trial. Soldier #5 is expected to testify that he was present at the 27 July 2002 firefight; that he participated in the ground assault; that the final assault element took fire from the alcove in the compound (where the enemy combatants were later found); that he saw the grenade that wounded SFC Speer and that it came from the back of the alley; that the gunfire from the alcove came first and after that the grenade was thrown; and that OC-1 was the first person to enter the alley in which Mr. Khadr was located. This testimony is not cumulative because this account differs from other members of the assault team who entered the compound.

h. Soldier #7: The subject of previous defense motions and hearings at which the prosecution agreed to produce for trial on 16 December 2008. The prosecution offered to produce Soldiers #2, #3, and #7 if the defense withdraws its request for Soldier #5 and #8. We decline that offer and reassert our position that each witness is relevant and necessary for trial. Soldier #7 is expected to testify that he was present at the 27 July 2002 firefight; that he observed movement, which he believed to be a person, through a hole in the wall of the compound immediately before the assault element entered; that he heard gunfire inside the compound; that he saw a grenade fly through the air approximately 25-30 yards, which he describes as a "significant distance" and "not a wimpy throw"; that US forces threw grenades in the compound in the course of the final assault; that after the firefight, weapons, including a pistol, were found near the bodies of the enemy combatants; and that Mr. Khadr was found when one of the soldiers thought he had found a trap door.

i. Soldier #8: The prosecution offered to produce Soldiers #2, #3, and #7 if the defense withdraws its request for Soldier #5 and #8. We decline that offer and reassert our position that each witness is relevant and necessary for trial. Soldier #8 will testify that he was present at the 27 July 2002 firefight. He will testify that he entered the compound following the ground assault and observed three dead enemy combatants in addition to Mr. Khadr in the compound and that one of the dead combatants had a grenade next to his hand. He will also testify that he heard an explosion and gunfire coming from the compound in the course of the final assault. This testimony is not cumulative because this account differs from other members of the assault team who entered the compound.

j. [redacted]: [redacted] was a Foreign Service Officer (Canadian) who interviewed Mr. Khadr at Guantanamo Bay, Cuba. [redacted] has agreed to speak to defense counsel but refused to do so without the permission of the Canadian Government. The US government made the request months ago and according to a Canadian government official, [redacted]

[redacted] should have permission to speak with defense counsel soon. The defense believes [redacted] will testify concerning the substance of exculpatory statements made by Mr. Khadr to Canadian interrogators in 2003, and the circumstances of Mr. Khadr's detention in 2004, including Mr. Khadr being subject to prolonged sleep deprivation under the so-called "frequent flyer program" at JTF-GTMO. The defense will update information concerning [redacted] when we speak to him.

k. Interrogator #3: Interrogator #3 will testify that he was present for several interrogations of Mr. Khadr at Bagram. He will testify that Interrogator #1 threatened Mr. Khadr with rape during an interrogation. The prosecution has agreed to stipulate to his testimony at trial. The defense does not agree to a stipulation of his testimony for a trial in front of the members. The prosecution refuses to make Interrogator #3 available for trial without an order from the Military Judge. The defense requests that the commission issue an order compelling his production.

l. [redacted]: The prosecution has neither approved nor denied [redacted] at this time. This is understandable considering the timing of the defense request. Should the government agree to produce [redacted] we will withdraw the request for her to be produced at Guantanamo Bay for testimony. [redacted] is a dean at [redacted] in Canada. She is available to testify at Guantanamo Bay during sentencing. [redacted] will testify that she has communicated about Omar Khadr through various attorneys since 18 September 2008. During this time she has followed Mr. Khadr's case closely and has sent Omar letters and educational books to assist in his studies. [redacted] will testify that her university is willing to accept Omar Khadr immediately in accordance with the school's mature student policy. She will also testify that there is a firm commitment by the board of the university to assist Omar Khadr by providing a structured, safe, educational environment when he is released from US custody. This evidence is clearly mitigating and vital to the defense case in sentencing.

m. [redacted] has agreed to testify via VTC from Houston, Texas. [redacted] is expected to testify about the element "in violation of the Law of War." [redacted] will testify that the element "in violation of the Law of War" is not well settled law. In fact, he will state that there is no rationale for the Government's position that a violation of the law of war occurs during a non-international armed conflict when an unprivileged belligerent kills a privileged belligerent in a non-treacherous, non-perfidious manner. As such, the defense has the right by statute to defend against this element consistent with the notion of a full and fair trial.

n. [redacted] conducted the autopsy of the decedent, Christopher Speer. She is expected to testify about the manner and cause of death of Christopher Speer . [redacted] is a retired military officer who is subject to compulsory process. The defense must be able to question this witness about her findings under oath.

o. The defense has several expert witness requests pending with the Convening Authority. If any of those requests are denied, we anticipate a motion to compel denied expert witnesses.

5. Law and Argument:

a. The Defense is Entitled to the Production of Relevant and Necessary Witnesses

(1) The right to call witnesses in one's own defense is essential to a fair trial. *In re Oliver*, 333 U.S. 257, 274 (1948). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 301 (1973). The prosecution intends to call more than 20 witnesses against Mr. Khadr. "Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also United States v. McAllister*, 64 M.J. 248, 249 (C.A.A.F. 2007) (explaining the accused's right "to present his own witnesses to establish a defense . . . is a fundamental element of due process of law"). Accordingly, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor . . . ." U.S. CONST., Amend. VI.

(2) The right to call witnesses in one's favor is implicit in Common Article 3 of the Geneva Conventions, which requires that, at a minimum, Mr. Khadr be afforded all the judicial guarantees that are "recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, 6 U.S.T. 3316, 3318 (1955). A survey of criminal procedure across the diverse legal systems of thirteen countries shows that *only China* regularly dispenses with defense witnesses. Craig M. Bradley, Ed., CRIMINAL PROCEDURE: A WORLDWIDE STUDY 104-05 (Carolina Academic Press 2d. ed. 2007) (detailing criminal procedure in Argentina, Canada, China, Egypt, England and Wales, France, Germany, Israel, Italy, Mexico, Russia, South Africa and the United States).

(3) For trial by military commission, this fundamental right is formalized by R.M.C. 703 and MCA § 949j. Under these rules, Mr. Khadr is entitled to the production of witnesses whose testimony is both "relevant and necessary." R.M.C. 703(b)(1) ("Each party is entitled to the production of any available witness whose testimony on a matter in issue on the merits or on an interlocutory question would be relevant and necessary."); *see also* MCA § 949j. The language contained in R.M.C. 703(b)(1) is identical to the language contained in the Rule for Courts-Martial 703(b)(1) ("RCM"). Accordingly, the prosecution is under no lesser a duty to produce the witnesses sought by Mr. Khadr than it would be in any courts-martial. *See* MCA § 949a(a) (stating military commission procedures shall "apply the principles of law and rules of evidence in trial by general courts-martial" in so far as the Secretary considers practicable).

b. The Testimony of the above Witnesses is Relevant

While "relevance" is not defined in the MCRE, the MRE defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Mil.R.Evid. 401. Certain testimony is "clearly relevant, since it would assist the trier of fact in determining a fact in issue, *i.e.,* the identity of the assailant." *United States v. Jones*, 26 M.J. 197 (C.M.A. 1988). Generally, the relevance of a given witness' testimony should be

"liberally construed in favor of permitting an accused the right to be heard *fully* in his defense." *United States v. Coffin,* 25 M.J. 32, 34 (C.M.A. 1987) (emphasis in original).

c. The Testimony of the above Witnesses is Necessary

Relevant evidence is "necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue." RCM 703(f)(1), Discussion. "Factors to be weighed to determine whether personal production of a witness is necessary include: the issues involved in the case and the importance of the requested witness to those issues; whether the witness is desired on the merits or the sentencing portion of the case; whether the witness' testimony would be merely cumulative; and the availability of alternatives to the personal appearance of the witness, such as depositions, interrogatories, or previous testimony." *United States v. McElhaney*, 54 M.J. 120, 127 (C.A.A.F. 2000); *see also United States v. Manos*, 37 C.M.R. 274, 279 (C.M.A. 1967) ("impressing on all concerned the undoubted right of the accused to secure the attendance of witnesses in his own behalf; the need for seriously considering the request; and taking necessary measures to comply therewith if such can be done without manifest injury to the service.").

6. Conclusion: The expected testimony of these witnesses will be vital to Mr. Khadr's defense. Their absence would render these proceedings fundamentally unfair, deprive Mr. Khadr of the due process of law to which the U.S. Constitution, the MCA and RMC entitle him and be in direct contravention of judicial guarantees recognized as indispensible by civilized people.

7. Oral Argument: The defense waives oral argument except as to [redacted].

8. Witnesses and Evidence: The Defense waives the right to call witnesses except as to [redacted].

9. Certificate of Conference: The defense has conferred with the prosecution regarding the requested relief. The prosecution objects to the requested relief.

/s/
JON S. JACKSON
LTC, USAR
Detailed Defense Counsel

UNITED STATES OF AMERICA	**D ___**
v.	**GOVERNMENT'S RESPONSE**
OMAR AHMED KHADR **a/k/a "Akhbar Farhad"** **a/k/a "Akhbar Farnad"** **a/k/a "Ahmed Muhammed Khali"**	**Defense Motion to Compel Production of Witnesses** **25 July 2010**

1. Timeliness: This response is timely filed.

2. Relief Requested: The Government requests that the Military Judge: (1) Permit [redacted] to testify via VTC; (2) Deny the Defense request to produce Interrogator #2; (3) Permit Interrogator #1 to testify via VTC; (4) Deny the Defense request to produce [redacted] (5) Approve the Defense request to produce Soldier #2; (6) Approve the Defense request to produce Soldier #3 via VTC; (7) Deny the Defense request to produce Soldier #5; (8) Approve the Defense request to produce Soldier #7; (9) Deny the request to produce Soldier #8; (10) Deny the Defense request to produce [redacted]; (11) Deny the Defense request to produce Interrogator #3; (12) Deny the Defense request to produce [redacted] and (13) Deny the Defense request to produce [redacted]

3. Overview: Since the inception of this case, the United States has gone to great lengths to ensure fairness in this Military Commission. The Government has consistently acted in good faith and granted or denied defense witnesses applying the standard provided in the Manual for Military Commissions. Notwithstanding the untimeliness of the Defense requests and motion, the Government has again done so here and approved requests where warranted. The Government respectfully requests the Military Judge apply that same standard and grant the relief requested by the Defense consistent with the Government's recommendation.

4. Burden and Persuasion: The Defense, as the moving party for this motion, bears the burden of establishing any factual issues necessary to resolve the motion by a preponderance of the evidence. *See* Rules for Military Commissions ("RMC") 905(c)(2)(A).

5. Facts:

a. The facts contained herein are not intended to be an exhaustive list of all actions of counsel related to witness production and access to witnesses in this case. The Government and Defense have communicated on numerous occasions regarding these issues, and others, and continue to have a collegial relationship, recognizing at times we will take opposing viewpoints on certain matters related to this case. The Government also recognizes that many of the actions of defense counsel and Omar Khadr were not

[redacted]

taken by Lieutenant Colonel Jackson, and some even pre-date his participation in the case. Recitation of the relevant facts is intended to provide appropriate background in order to aid the Military Judge in making a ruling on the Defense request.

b. On 29 September 2008, the Defense submitted a request for production of twenty witnesses "at trial (and/or on interlocutory matters)." [1] Although the Defense did not specify, based on its 7 November 2008 motion to suppress (D-094), the following witnesses from the 29 September 2008 request were requested to testify in support of a Defense motion to suppress the accused's statements (D-094): (1) [redacted]

c. On 9 October 2008, the Government denied the Defense request for [redacted] In its response, the Government noted that the Defense had not indicated how any of these witnesses would provide relevant testimony. Moreover, each of these witnesses that the Government was able to locate indicated that they had never been contacted by the Defense regarding their proffered testimony in this case.[3]

d. On 7 November 2008, the Defense requested production of additional witnesses at trial (and/or on interlocutory matters). Again, based on D094, the following witnesses were requested for the purpose of testifying during the suppression hearing; (1) [redacted] [4]

e. In response to the 7 November 2008 request, the Government attempted to contact [redacted] Each of these witnesses indicated that they had never been contacted by the Khadr Defense Team regarding their prospective testimony or willingness to testify.

f. On 5 December 2008, the Defense filed motions to compel [redacted] (D-100) and [redacted] (identified as Ms. H) (D-101)[5].

g. On 16 December 2008, the Military Judge ordered the Government to make arrangements for [redacted] and Ms. H's testimony. The Military Judge noted that

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[1] See Attachment A to D114.

[2] [redacted] has been previously identified as Ms. H and Ms. N. She will be identified as [redacted] during this filing, reflecting her current status on Active Duty in the U.S. Army.

[3] See Attachment B to Gov't Response to D108.

[4] See Attachment C to Gov't Response to D108.

[5] Ms. N, formerly Ms. H, is a reservist Sergeant First Class currently on active duty in the U.S. Army. Accordingly, the Government believes it is most appropriate to refer to her as SFC N, reflecting her current military status.

> The defense counsel apparently have not talked to SSG L, Captain J.C.M. or Ms. H in order to ve rify that eac h will testify in accord ance with the defense's proffer. The defense counsel did not ask for assistance from the trial counsel to talk to any of these witnesses af ter their efforts to contact each witness was unsuccessful. The Defense counsel must contact each of these witnes ses to verif y that the witness' tes timony will be consis tent with the proffered testimony. The defense counsel m ay ask the trial counsel for assistance in contacting these witnesses. The Defense counsel must respon d in writing to the comm ission no later th an 9 January 200 9 advising the comm ission that it has contacted each witness and verified the proffered testim ony or explain why those efforts have been unsuccessful. **Failure to do so may resu lt in the co mmission not requiring the Government to make arrang ements fo r a w itness' testimony at trial**.

D-095, Ruling (emphasis added).

h. On 20 January 2009, the Government requested the first of two 120-day continuances, followed by a 60-day continuance to permit a Presidentially-directed inter-agency review of the status of all individuals detained at Guantanamo Bay, Cuba, including the accused, in order to determine whether any of them could be transferred or released and, if not, whether and how they should be prosecuted for any offenses they might have committed.

i. The Government was not contacted by the Defense to request assistance locating any potential witnesses at any point during the 300-day continuance period.

j. Mr. Barry Coburn and Mr. Kobie Flowers began representing the accused sometime after July 2009, and entered notices of appearance on 8 September 2009.

k. Lieutenant Colonel Jackson was detailed to this case on 7 October 2009.

l. On 7 October 2009, the Military Judge directed the Defense to provide the commission and the Government an email indicating the status of Defense efforts to review materials related to this case. The Military Judge further directed that the parties conduct a conference call on 4 December 2009 to discuss any outstanding issues and discuss scheduling for the case.

m. During the 4 December 2009 RMC 802 conference, the Military Judge and the parties discussed proposed trial dates and the Military Judge directed the parties to submit their comments regarding a proposed trial schedule no later than 18 December 2009.

n. On 18 December 2009, the Government submitted its proposed trial schedule and expressed its continuing willingness to assist the Defense in its preparations

to the greatest extent possible. In addition to the subject filing, the Government has reiterated this offer on numerous occasions, and provided assistance in explaining the history of this case and the significance of many pre-trial rulings, including those with respect to production of witnesses and access to intelligence interrogators.

o. Following several submissions by both parties, the Military Judge issued a scheduling order (MJ019). That Order set a pre-trial motion date for the suppression hearing of 26 April 2010 and trial in this case for 12 July 2010. Defense requests for trial witnesses were to be made no later than 21 May 2010.

p. On 19 February 2010, the Government requested that the Defense provide, among other things, "Names and contact information of all witnesses the defense requests the Government to produce in the suppression hearing scheduled for 28 April 2010. **This includes those previously requested in D094 and any additional witnesses."** Attachment D (emphasis added.)

q. The Defense responded to this request on 9 March 2010 with an "initial list" of witnesses for the 28 April 2010 suppression hearing. The initial list included: (1) [redacted]

r. The Government immediately attempted to contact the witnesses above, using the information provided by the Defense. The Government did not get a response from [redacted] indicated that she had never talked to the Defense and did not have any knowledge regarding Omar Khadr. The Defense indicated that they had spoken with [redacted], however he indicated that he wanted to coordinate with Canadian officials prior to indicating whether or not he would be available to provide testimony at the suppression hearing. [redacted] indicated that he had not been contacted by the Defense for over a year. [redacted] attorney indicated that he did not know whether his client had any information that would be helpful to the Defense and, to his knowledge, the Defense team had not spoken with his client. [redacted] indicated that he had traded emails with the Defense, however he was not aware that the Defense was going to ask him to be a witness. [redacted] indicated they did not speak to the Defense until 8 and 9 March 2010 and both expressed surprise that they were listed as a Defense witness.

s. On 16 Mar 2010, the Defense requested the Government's assistance in locating and contacting Interrogators 1, 2, 3, 5, 11, and 17. The Defense indicated they were in contact with Interrogator #1, however noted that Interrogator #1 had not decided whether he would meet and/or speak with the Defense. Captain Murphy emailed the Defense requesting that they contact him to coordinate interviews of Interrogator #2 and Interrogator #11. As of the date of this filing, the Defense has not contacted the Government regarding Interrogator #2 or Interrogator #11. The Government located

[redacted]

Interrogator #3 and he indicated that he did not want to speak to anyone from the Defense team. As the Military Judge is aware from the suppression hearing, the Government provided contact information for Interrogator #17 to the defense, and the current defense team failed to contact #17 prior to his testimony. The Government facilitated an interview of Interrogator #5 and arranged a VTC to take his testimony during the motion the suppression hearing; however the Defense elected not to call him to testify.

t. On 21 March 2010, the Defense, notwithstanding its previous request, requested to interview every interrogator of Omar Khadr since he was in American custody. The Government subsequently reminded the Defense of the Military Judge's previous ruling in D-035, which requires the Defense to indicate how they believe a particular interrogator would have information that is material to the preparation of the defense or otherwise exculpatory prior to requiring the Government to assist the Defense in contacting any particular interrogator. The Government located Interrogator #4 and facilitated an interview for Defense Counsel.

u. On 23 March 2010, the Government responded to the Defense request for witnesses. The Government denied [redacted] The Government denied the Defense request for [redacted] however notified the Defense that we would continue to support the Defense request to speak to [redacted], and re-consider our denial after the Defense speaks to [redacted] The Defense subsequently provided an additional proffer and the Government approved the Defense request. The Government asked the Defense to provide an updated proffer of expected testimony for [redacted] as the Defense had not interviewed these witnesses at the time of the original Defense request. The Government agreed to produce [redacted] (via VTC), [redacted] The Government reserved the right to challenge [redacted] testimony. The Defense later requested the Government to produce [redacted], Interrogator #1, Interrogator #5, and Interrogator #17. The Government agreed to produce each of these witnesses.

v. After the Military Judge granted the Government's request for a psychological examination of the accused resulting in a delay of the trial for approximately four weeks, the Defense requested a corresponding four week delay to file requests for witnesses. The Military Judge partially granted that request, extending the deadline for Defense witness requests until 11 June 2010.

w. On 11 June 2010, the Defense submitted a request for 45 witnesses for trial. *See* Attachment A. The witness list is largely verbatim to the original witness request submitted by previous defense counsel in this case, including requests for numerous witnesses who had not been contacted by the current defense team.

x. On 22 June 2010, the Government provided a response to the request, denying many of the requests because of failure to provide a synopsis of the expected testimony or contact information. *See* Attachment B.

y. On 1 July 2010, the Defense filed a request for a continuance of the 2 July 2010 due date for filing a motion to compel. That motion was never acted upon and the due date for motions to compel witnesses passed without a motion being submitted by the Defense.

z. On 5 July 2010, the Defense sent the Government a draft motion to compel witnesses, largely cut and pasted from the 11 June 2010 witness request. *See* Attachment C.

aa. On 7 July 2010, the Defense filed a motion to withdrawal as counsel.

bb. As a result the accused's professed desire to dismiss all of his counsel and proceed *pro se*, or alternatively boycott the proceedings, the commission held a hearing on 12 July 2010 addressing primarily the accused's most recent elections regarding counsel. During the 12 July 2010 hearing, the accused indicated that he did not want counsel to call witnesses or file motions on his behalf.

cc. Lieutenant Colonel Jackson then sought an ethics opinion to determine whether or not he should abide by the accused wishes and not file motions or present evidence during the military commission.

dd. The Military Judge directed Lieutenant Colonel Jackson to provide a status report by 16 July 2010 indicating what progress he had made in his efforts to obtain an ethics opinion. After Lieutenant Colonel Jackson indicated that "I have determined I will be able to have an answer to my ethics issue on or before 2 AUG 2010," the Government requested a conference call to clarify what progress Lieutenant Colonel Jackson had made in seeking the opinion and determine whether or not the Defense would be requesting witnesses or a delay in the upcoming trial.

ee. Lieutenant Colonel Jackson indicated that he would represent the accused and intended to request witnesses as soon as possible and that he would not request a delay in the trial scheduled for 10 August 2010. The Government urged Lieutenant Colonel Jackson to clarify what witnesses the Defense was requesting and explained to the Military Judge and counsel that, although the delay in the most recent requests were not the fault of Lieutenant Colonel Jackson, the Government viewed witness requests submitted at this late date as untimely.

ff. Lieutenant Colonel Jackson submitted a request for 27 witnesses on 22 July 2010, 10 of whom the Government had previously agreed to produce. *See* Attachment D.

gg. The Government responded to the Defense request on 23 July 2010. *See* Attachment E.

hh. The Defense filed the subject motion later the same day.

6. Discussion:

a. The United States has gone to great lengths to ensure fairness in trials conducted by military commission. Consistent with our obligation to ensure this process is fair, the Government has repeatedly offered assistance to the Defense in locating witnesses and evidence, as well as guidance regarding the rules applicable to trials by military commission; rules which are rooted in over fifty years of court-martial practice.

b. Among the many protections provided to an accused facing trial by military commission is a right to production of witnesses and evidence. RMC 703 provides that the Defense shall have reasonable opportunity to obtain witnesses and other evidence. The Government has taken its obligations seriously in this case, and approved defense witness requests on numerous occasions where the Defense has made the requisite showing of relevance and necessity.

c. In denying these requests, the Government enforced the standard for production of witnesses contained in the Manual for Military Commissions; a standard that is patterned directly after the standard used in courts-martial practice around the world by the United States military. The Government respectfully requests that the Military Judge enforce the standard as well by denying the Defense requests for failing to establish the requisite showing.

d. RMC 703 (c)(2)(B) governs Defense requests for witnesses in military commission cases. Specifically, the Defense is required to:

> [Provide][a] list of witnesses whos e testim ony the defense considers relevant and necessary on the merits or on an interlocu tory question [that] shall include the nam e, telephone number, if known, and address or location of the witnes s such that the witn ess can be found upon the exercise of due diligence and a s ynopsis of the expected testim ony sufficient to show its relevance and necessity.

RMC 703 (c)(2)(B).

e. In many of the witness requests that are the subject of this filing, the Defense has failed to make the requisite showing. Moreover, all of the instant requests are untimely, submitted less than three weeks from trial, notwithstanding the fact that the accused has been facing charges for over three years and been consistently represented by numerous qualified and zealous counsel.

f. Examination of witness requests submitted over the course of this litigation, demonstrates that on many occasions, the Defense has simply elected not to comply with applicable rules when requesting witnesses. Rather than submit a synopsis of the expected testimony sufficient to show the testimony of the witnesses relevance and necessity, witness requests have often included little or no explanation as well as no contact information.

g. On numerous occasions, the Government has contacted witnesses and learned the Defense had not even talked to the witness or let them know they were requesting their presence to testify. The practice of submitting such deficient request has continued up to the current request for witnesses.

h. The Defense has essentially taken the position that it is incumbent upon the Government to show why a witness is not relevant and necessary. In some instances, it is certainly possible that a requested witnesses' testimony might be relevant and necessary, however the Defense has often failed to show how the witnesses' testimony is relevant and necessary. This attempted burden shift has often continued through motions to compel the production of witnesses and ultimately during hearings. The Defense has made a practice of providing information and argument incrementally on each witness, saving their best argument for the hearing to litigate the production of the witnesses. It is not clear whether this is done for strategic reasons or simply because the Defense didn't take the time to submit an appropriate justification, or in some instances even contact a prospective witness prior to putting their name on a list and asking the Government to compel their presence at a hearing or trial. Regardless, this is not efficient or effective practice, and is not permitted under applicable by the rules.

i. After the Defense submitted its 11 June 2010 request, the Government, as we have done on every request, attempted to contact all of the proposed witnesses. Like on so many other occasions, many of the witnesses were unaware they were being requested as a witness. In perhaps the most extreme example, [redacted] a forensic pathologist who had been approved over two years ago to assist the Defense and ultimately testify regarding his findings, indicated that he had not been contacted by the Defense in over eighteen months. Nevertheless, the Defense placed him, and many others, on the request.

j. To his credit, Lieutenant Colonel Jackson attempted to pare down the request and attempted to demonstrate the relevance and necessity of particular witness in certain cases. As Lieutenant Colonel Jackson indicated, the parties have discussed several of the witnesses and attempted to resolve any differences of opinion regarding the production of witnesses. In the cases where he has made an appropriate showing (either in conversations or written requests) the Government has on each occasion granted the request for the witness, at least via VTC if factors exist that preclude the witnesses' testimony in person at Guantanamo Bay.

k. Indeed, the Government has agreed to produce several of the witnesses that are the subject of this motion, some with the caveat that they must testify via VTC for either professional, personal, or security reasons. The Government will attempt to analyze each outstanding request below, but in some cases it is made difficult by the failure of the Defense to articulate a sufficient basis for why they believe the witness is relevant and necessary. It is not the Government' responsibility to brainstorm and determine how a witness might be relevant and necessary or to demonstrate why a witness is not relevant and necessary. It is the Defense's burden to make the requisite

showing. Where they have failed to do so or merely indicated that they believe a witness is relevant and necessary, the showing is insufficient and the request should be denied.

l. It bears repeating that the process of arranging the presence of witnesses at Guantanamo Bay is time consuming. Every witness must have an approved theater and country clearance, travel orders, flight reservations, and hotel reservations in transit to GTMO and upon arrival. All of these approvals and arrangements require significant coordination. For this reason, requests must be submitted as far in advance as possible. In this case, the Government will not know what witnesses we are required to produce until almost two weeks prior to commencement of trial, assuming the military judge rules on the subject motion early this week. This will put everyone associated with witness travel under tremendous pressure and the Government will have a difficult time accomplishing this task, which could lead to delays in the trial while waiting for witnesses to travel to Guantanamo Bay. This will result in an inconvenience to everyone associated with the trial as well as additional expense for the Government.

[redacted]

m. The Prosecution has agreed to produce [redacted] to testify via video teleconference (hereinafter VTC). The Defense motion indicates the "defense objects to testimony of this witness at a trial before members via VTC. [redacted] is subject to the compulsory process of this military commission." *See* Defense Motion at 1.

n. The Defense filing does not indicate why [redacted] testimony via VTC is insufficient or what rule requires his presence. Moreover, the motion fails to even mention RMC 703(c)(3), which specifically contemplates taking testimony via VTC during military commission proceedings. Specifically, RMC 703(c)(3) provides:

> [u]pon request of either party the military judge may permit a witness to testify from a remote location by two-way video teleconference, or similar technology. 'If the opposing party objects to such a request, the military judge shall resolve the matter by balancing all probative factors, including, but not limited to, the need of either party for personal appearance of the witness, the remote and unique situation of the forum, and the logistical difficulties in obtaining the presence of the witness.

RMC 703(c)(3).

o. In the present case, the Defense has made no showing of their need for the personal appearance of this witness. That alone should warrant denial of the request to compel [redacted] presence in person. On the other hand, analysis of other factors further justifies permitting testimony via VTC. Guantanamo Bay is indeed a remote and unique forum. Arranging travel for witnesses requires significant planning, including obtaining country and theatre clearances, and flights in and out are limited, generally requiring witnesses to travel at least a day in advance of their scheduled testimony, as well as remaining at Guantanamo Bay until another flight is scheduled to depart. This is

[redacted]

by no means the deciding factor in determining whether a witness should be permitted to testify via VTC, but is an important factor to take into consideration.

p. There are a number of reasons why it is appropriate to take [redacted] testimony via VTC. He is a senior civilian employee of a government agency with significant management responsibilities. His absence from the office for four days (the estimated minimum amount of time for him to travel to Guantanamo Bay, testify, and return) will have a significant negative impact on his civilian duties. Many of the details of [redacted] employment involve classified information. Therefore, the Government has prepared a classified *ex parte*, *in camera* filing detailing the specific impact his absence will have upon his office as well as other security issues presented by this travel to and testimony at Guantanamo Bay. The reasons contained therein clearly establish a strong basis to take his testimony via VTC. The Government has made arrangements to file this motion with the court security officer early next week.

Interrogator #2

q. The Defense Motion indicates that interrogator #2's interrogation "formed the basis" for subsequent FBI interrogations and will assist the trier of fact in assessing the credibility of those witnesses' (presumably FBI Agents) testimony. Notably, the request does not demonstrate how interrogator #2's testimony would or is even likely to assist the trier of fact other than stating that it will. Interrogator #2 talked to Omar Khadr on one occasion, early in his detention at Bagram. The Defense has not shown how any information obtained during that interrogation or anything interrogator #2 saw or heard during that interrogation is relevant to later law enforcement interviews of the accused conducted months later. The Defense synopsis fails to establish that Interrogator #2's testimony is relevant and necessary and should therefore be denied.

Interrogator #1

r. The Government has agreed to produce Interrogator #1 via VTC. Like the request for [redacted] the Defense fails to articulate why it is necessary for Interrogator #1 to testify in person as opposed to VTC. A balancing of the factors warrants permitting his testimony via VTC.

s. Interrogator #1 has indicated that he is not willing to travel to GTMO. He is a civilian and sole breadwinner for his family (which includes a newborn) and he is not reimbursed for his time away from work.

t. The Defense called interrogator #1 during the suppression hearing via VTC. Other than on a few occasions where counsel and the witness spoke over each other, the testimony was effectively presented and the VTC did not hinder the Defense from presenting testimony to the Military Judge. The Defense has not pointed to any problems with the testimony taken at the suppression hearing via VTC. There is no reason to think that the testimony cannot be presented to the members in an equally effective manner.

u. Although the Defense might prefer to have this witness present, they fail to demonstrate the necessity of producing the witness in person. Under these circumstances, the balancing of all the factors favor approval of permitting the testimony via VTC.

[redacted]

v. The proffered testimony of [redacted] largely relates to his observations of interrogations of detainees other than Omar Khadr -- testimony that would be clearly inadmissible at trial. The Defense is essentially calling [redacted] to testify that he witnessed harsh interrogations and conditions of confinement, none of which relate to the accused. As the Government pointed out repeatedly during the suppression hearing, the Defense is offering [redacted] testimony for an improper purpose. The Defense has not proffered any testimony that would actually be admissible at trial; therefore the witness, by definition, is not relevant and necessary.

w. Although [redacted] direct examination was conducted by counsel other than Lieutenant Colonel Jackson, a review of the record demonstrates that the Defense repeated elicited testimony that would be inadmissible under the Rules for Military Commission. *See generally* MCRE 401-406, 608, and 609. The Defense counsel improperly invoked each of these rules throughout the hearing, grasping to find a rule the Military Judge might find acceptable to permit the testimony. The following colloquy from the hearing is instructive:

> Mr. Flowers: So, for those reasons, [redacted] testimony is very, very relevant under 401. It also goes und er 304. It also goes to impeach oth er government witnesses under 607, 609.
>
> Colonel Parrish: I'm not sure you meant to mention all those rules.
>
> Mr. Flowers: Well, specifically all of the impeachment rules.
>
> Colonel Parrish: Yeah, just through them all out there and see which one sticks.

Draft ROT at 2991.

x. Throughout the hearing, the Military Judge pointed out on numerous occasions, that he, as a trained military judge, is able to disregard improper testimony. The Government agrees with the Military Judge; however, at trial if the Defense attempts to present improper character evidence in the manner it did at the suppression hearing, it will be doing so in front of the members, which is clearly inappropriate and could impact the Government's ability to receive a fair trial in this case.

y. Ultimately, after exhaustive discussions and repeated objections, the Military Judge correctly pointed out that Rule 104 permits the Military Judge to relax the rules and give the testimony appropriate weight. Of course, RMC 104 will not apply during the trial, and testimony of witnesses, particularly character testimony, will only be permissible if admissible under the rules of evidence. In the present request, Defense Counsel have not articulated why [redacted] observations of interrogations of individuals other than Mr. Khadr would be admissible.

z. The Defense request states that [redacted] observed Mr. Khadr's "initial interrogation," notwithstanding the fact that [redacted] described being present for a "screening in-processing" of Mr. Khadr at the Bagram Combat Support Hospital. *See* Draft ROT at 2964. Regardless of the term used, nothing that was done during this interview, or said by Mr. Khadr during the interview, is relevant to any issue before the Military Commission [redacted] will not testify that the questioning was harsh or that Mr. Khadr was mistreated in any way. According to his testimony, he has a limited recollection of the interview. *See* Draft ROT at 2967.

aa. The Defense motion doesn't specifically state why any particular testimony o[redacted] is relevant and necessary, but rather gives a legally inadmissible description of what he might say. The first third of the paragraph is devoted to [redacted] recollections of the "screening in-processing," focusing generally on Khadr's physical state at the time. The fact that Khadr was severely injured during the firefight that led to his capture is not something that is reasonably in dispute. Numerous approved witnesses can testify to the nature of Khadr's injuries and [redacted] observations will not provide any value to the members. Further, Khadr's physical condition had changed drastically by the time [redacted] the law enforcement agent who will, subject to the Military Judge's ruling on D-094, present testimony of Khadr's first confession, first interviewed Khadr in October 2002. *See generally* …..int. 17's testimony, Mr. M's testimony, [redacted] testimony. DC's lay observations of Khadr's physical condition approximately two months prior to the first statement the Government seeks to introduce is simply irrelevant.

bb. The remainder of the paragraph includes specific instances of conduct by interrogators, but none related to Mr. Khadr. This testimony is improper character evidence that would be likely be inadmissible under the rules.

cc. Some of the proposed testimony relates to interrogator #1 and references specific instances of misconduct. Of course, character evidence of this nature would be inadmissible to show that Interrogator #1 acted in conformity therewith. *See* RMC 404(a)(3) and RMC 608. The Defense has made no argument otherwise.

dd. Indeed, [redacted] *might* be able to provide testimony that *might* be admissible under MCRE 406. However, in the present case, the Defense proffer fails to establish that [redacted] has the degree of knowledge required to establish that the conduct in question of Interrogator #1 was habitual. Character and habit evidence are close, but not the same.

> Character is a generalized description of one's disposition, or of ones' disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.

See McCormick on Evidence § 162, at 340 (6d ed. 2010).

ee. Here, the motion doesn't contain any specifics from [redacted] regarding his relationship with Interrogator #1 or his degree of familiarity with Interrogator #1's practices during interrogation. For example, it would be important to know how much time he observed Interrogator #1 during his tour at Bagram. It would also be important to determine how many times [redacted] worked with Interrogator #1 or whether he was familiar enough with Interrogator #1's interrogations to be able to say certain conduct was a habit or routine practice.

ff. To the extent the Defense is calling [redacted] to elicit evidence of habit of a person or of the routine practice of an organization, *see* RMC 406, the Defense is not in a position to say with any degree of certainty that [redacted] can establish an appropriate foundation. Based on [redacted] testimony, including numerous references to his lack of memory of the events, it is doubtful tha [redacted] has the requisite knowledge. In any event, the Defense clearly has not established that he does, in fact, have the requisite knowledge. This is a condition precedent to establishing the relevance and necessity of his expected testimony. Obviously if his purported testimony is not even admissible (which the Defense hasn't established), his testimony is not "relevant and necessary" as required under MCRE 703 and the Government should not be required to make arrangements for his testimony.

gg. Even if [redacted] knowledge is sufficient to provide an opinion regarding Interrogator #1's habits as an interrogator, it is important to look at this testimony in the overall context of the trial. First and foremost, the Government is not offering any statements made by the accused to Interrogator #1. The first statement of the accused that the Government is attempting to offer wasn't made until several weeks after any interrogations conducted by Interrogator #1.

hh. Nevertheless, to the extent that these interrogations are relevant as they might impact later statements made by the accused, the Defense has much better sources of testimony regarding specific interrogations than the speculative testimony that [redacted]

[redacted] *might* be able to offer. The two witnesses who have the most relevant knowledge in this regard are: (1) the accused (who has the option of testifying regarding the interrogations at issue); and (2) Interrogator #1 (or someone who observed a particular interrogation of the accused). Frankly, whether Interrogator #1 used the "fear up" technique with the accused is a matter that is not reasonably in dispute. He testified at great length during the suppression hearing regarding his interrogations of Khadr and is scheduled to testify at trial for the Defense. Moreover, the interrogator notes previously provided to the Defense and which the Defense has indicated they will seek to offer indicate that the "fear up" technique was used when interrogating the accused. Further, after interviewing Interrogator #1, the Government provided a notice to the Defense that Interrogator #1 indicated he used the "fear up" technique when interrogating the accused by relaying a fictitious story about a man who was raped in U.S. prison (telling the accused that he should cooperate with the interrogation in order to avoid going to U.S. prison). The Defense is calling Interrogator #1 who will confirm that he used the particular approach with the accused. The Government has no reason to believe that Interrogator #1 will not testify consistently with the comments he made during the Government's pre-hearing interview.

ii. Again, to the extent [redacted] could establish that Interrogator #1 had a habit or routine practice of employing a particular tactic in every interrogation, his testimony *might* be admissible and helpful to the military judge. Here, at most, [redacted] would testify that Interrogator #1 often used the "fear up" technique, a matter that is not really at issue. The Defense has provided no proffer, and the suppression hearing testimony of [redacted] did not suggest he has the ability to provide any other MCRE 406 testimony that would aid the members in determining the appropriate weight to give to the accused's statements.

jj. To the extent that any of the Defense arguments establish that [redacted] testimony is remotely relevant and necessary, the probative value of [redacted] testimony is far outweighed by the confusion of the issues and misleading of the commission that could be caused by permitting her to testify. *See* MCRE 403.

kk. Moreover, ordering [redacted] testimony would be a waste of time considering his unclear recollection of events and unknown foundation for his opinions. *Id.* In the present case, [redacted] testimony will be of very little, if any, value to the Military Commission.

ll. As noted above, the Defense has not established how [redacted] testimony would be admissible at trial. Inadmissible testimony is not relevant. Furthermore, to the extent that [redacted] testimony is relevant it would be cumulative and therefore not necessary under RMC 703 and MCRE 403.

mm. In the event the Military Judge disagrees with the Government and order production of [redacted] the Government respectfully requests that his testimony be taken via VTC. The Government respectfully incorporates its argument in P024, wherein we requested that [redacted] suppression hearing testimony be taken via VTC.

Soldier #2, Soldier #3, Soldier #5, Soldier #7, Soldier #8

nn. Although the Defense has requested each of these witnesses individually, it is important to assess their relevance and necessity in context. Each of these witnesses was present at the capture of the accused. In addition, [redacted] ill also provide testimony related to the capture of the accused and the proceeding firefight.[6]

oo. The Defense correctly points out that the Government indicated a willingness to produce Soldier #2, Soldier #3, and Soldier #7, in addition to all of the other witnesses mentioned in the paragraph above.[7] In the Government's view, providing ten witnesses who were present at the capture of the accused is sufficient to present all the relevant, non-cumulative testimony regarding the events of 27 July 2002.

pp. Indeed, there could be reason why one of the two individuals who remain in question could have relevant and necessary information for the military commission; however, a review of the previous statements and proffered testimony of the witnesses indicates that the testimony of Soldier #5 and Soldier #8 would be cumulative of the testimony of the other witnesses and would relate to matters that are not reasonable in dispute. The Defense has failed to provide any proffer showing why the testimony of Soldier #5 and Soldier #8 is unique and not cumulative to the other witnesses produced.

qq. In support of the motion to compel Soldier #5, the Defense provides the following proffer of his expected testimony:

> Soldier #5 is expected to testify that he was present at the 27 July 2002 firefight; that he particip ated in the ground assault; that the final assault element took fire from the alcove in the com pound (where the enemy combatants were later found); that he saw the grenade that wounded SFC Speer and that it came from the back of the alley; that the gunfire from the alcove cam e first and af ter that th e grenade was thrown; an d that OC-1 was the first person to enter the alley in which Mr. Khadr was located.

rr. All of the proffered testimony of Soldier #5 is cumulative of what other witnesses will say. Several other witnesses will testify that the assault

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[6] The Defense requested [redacted] as witnesses as well.

[7] The Government agreed to produce Soldier #3 via VTC. Because of the nature of Soldier #3's current duties and location, it is appropriate to take his testimony via VTC. The Government is submitting a classified *ex parte, in camera* filing requesting a protective order related to Soldier #3 in the event he is called as a witness. Among the protections the Government is seeking is that he be permitted to testify via VTC.

element took fire from the alcove in the compound (where the enemy combatants (including the accused) were later found). The Government will not present any evidence that contradicts this

ss. Likewise, many witnesses will testify that the grenade came from the alcove where the accused was captured. The Defense motion indicated that Soldier #5 indicated the grenade came from the back of the alley. It is worth noting that Soldier #5 is aware of where the accused was found in the alley and has indicated that he believes the accused threw the grenade in question. To the extent the Defense is calling Soldier #5 to suggest someone other than the accused threw the grenade, his testimony would seem unhelpful and inconsistent in that regard.

tt. The other witnesses also indicate that the gunfire from the alcove came first and after that the grenade was thrown by the accused. Soldier #5's testimony would in no way be helpful to the Defense in this regard either.

uu. Finally, it is not in dispute that [redacted] (OC-1) was the first person to enter the alley where Khadr was located. Several witnesses will testify to this, including [redacted].

vv. Based on the proffer from the Defense, the testimony of Soldier #5 is cumulative and would not help the Defense in any way. His testimony is therefore not relevant and necessary and the Military Judge should deny the request.

ww. It bears mentioning that Soldier #5 is also deployed at the present time in a theater of active combat operations. He is conducting regular operations, contingent on real-time intelligence. Requiring him to be present for VTC testimony (assuming the Military Judge would approve VTC testimony in lieu of in-person testimony) would be very disruptive to ongoing operations. While there could be circumstances to justify such a disruption of important operations, based on the minimal value his testify would provide the Commission, those circumstances are not present here.

xx. In support of the Defense request for Soldier #8, the Defense offers the following synopsis:

> Soldier #8 will testify that he was present at the 27 July 2002 firefight. He will testify that he entered the compound following the ground assault and observed three dead enemy combatants in addition to Mr. Khadr in the compound and that one of the dead combatants had a grenade next to his hand. He will also testify that he heard an explosion and gunfire coming from the compound in the course of the final assault.

yy. The Defense states that "this testimony is not cumulative because this account differs from other members of the assault team who entered the compound," but does not indicate how the account differs.

zz. Soldier #8's testimony is cumulative and is not helpful to the Defense. As an initial matter, Soldier #8 was not part of the team that cleared the compound and had no direct observations of their actions. When he did enter the compound, he saw three men that had been killed during the firefight, testimony that will be provided by several other eyewitnesses. The fact that he recalls one of the dead combatants having a grenade next to his hand doesn't help the accused (who was found only a few feet from the man in question) or tend to show that the accused did not throw a grenade or otherwise participate in the firefight with his al Qaeda co-conspirators. Of course, the accused has stated that he and the other combatants all had grenades that they threw during the firefight and several witnesses will testify that the individuals were found to be armed when they were searched.

aaa. The fact that Soldier #8 heard an explosion and gunfire coming from the compound in the course of the "final assault" is consistent with other witness testimony, including [redacted] (who was hit with grenade shrapnel during the assault), [redacted] (who saw a grenade fly over his head and also observed the impact of directed fire in his direction), Soldier #3 (who heard someone shout grenade), [redacted] (who observed a grenade fly through the air and impact next to Sergeant First Class Speer). Other witnesses corroborate this testimony. It is not clear what the Defense means when they state that the testimony of Solder #8 would not be cumulative in this regard.

[redacted]

bbb. At the time of the filing, [redacted] a Canadian citizen remains an unwilling witness in this military commission and the Government is unaware of any mechanism by which the Military Judge can compel his attendance, either in person or via VTC. The Defense filing indicates that a Canadian Government Official has indicated that [redacted] should have permission to speak with the Defense Counsel soon. While the Government does not object to [redacted] speaking to the Defense (and perhaps testifying – assuming he has relevant testimony), the Government takes no position whether or not it is appropriate for Canadian officials to authorize or direct [redacted] cooperation with the Defense.

ccc. The Government will provide a response if the Defense ultimately submits a request and demonstrates how the witness is relevant and necessary. However, at this point (nearly two weeks from trial) the Defense has still not provided enough information to even be able to assess whether his testimony is relevant and material.

Interrogator #3

ddd. In response to a previous motion to compel the testimony of Interrogator #3, the Military Judge ordered the Government to "either produce Interrogator #3 or agree to a stipulation of fact that Interrogator #3 made the proferred statements." *See* ORDER, D108.

eee. The Defense proffers the following testimony for Interrogator #3:

> Interrogator #3 was present for several interrogations of Mr. Khadr at Bagram. He will testify that Interrogator #1 threatened Mr. Khadr with rape during an interrogation.

fff. The Government does not dispute that during an interview with Interrogator #1 and Interrogator #3, Interrogator #1 told Khadr that bad things happen in American prisons, including rape and assault and that he (Khadr) didn't want to end up there.

ggg. Interrogator #1 (an approved defense witness) testified during the suppression hearing regarding the statements in question. The Government will stipulate that he did in fact make those statements and will not present any evidence to suggest that Interrogator #1 did not say these things. The Government provided a proposed stipulation of fact to the Defense shortly after the Military Judge's ruling in D108 and remains willing to sign the stipulation in lieu of providing this witness for trial.

hhh. The only basis offered by the Defense for calling Interrogator #3 is to corroborate the statements made by Interrogator #1. The Government does not dispute that such statements were made to the accused and will not attempt to impeach Interrogator #1 regarding the fact that such statements were made to the accused. Any statements made by Interrogator #3 are therefore cumulative and taking his testimony would be a waste of the Commission's time,[8] as well as a significant burden upon the Government, considering his current employment overseas. As such, Interrogator #3's testimony is not relevant and necessary and the Government should not be required to make arrangements for his testimony at trial.

[redacted]

iii. As the Defense indicated, the Government was only made aware of this potential witness 3 days ago -- less than 3 weeks from trial. We will attempt to contact her and provide a response once we have confirmed her expected

[8] Interrogator #3 is currently deployed overseas at a location where it would be difficult for him to reach an appropriate VTC site.

[redacted]

testimony. However, at this point, [redacted] should be denied based on the untimeliness of this request.

[redacted]

jjj. The Defense provides the following proffer for [redacted] testimony:

> [redacted] is expected to testify about the element "in violation of the Law of War." [redacted] will testify that the element "in violation of the Law of War" is not well settled law. In fact, he will state that there is no rationale for the Government's position that a violation of the law of war occurs during a non-international armed conflict when an unprivileged belligerent kills a privileged belligerent in a non-treacherous, non-perfidious manner. As such, the defense has the right by statute to defend against this element consistent with the notion of a full and fair trial.

kkk. The Panel members should receive the law from the Judge, not an expert witness. An expert witness on the law would not be helpful and is therefore not relevant and necessary.

lll. One can only imagine the "trial within a trial" that would ensue if the parties were permitted to call lawyers to advocate their positions on the law to the members. Law professors would no doubt come from far and wide to provide their views on international law and its application in trials before military commission.

mmm. A legal scholar, such as [redacted] appearing before the Commission as an "expert witness" to express an opinion on what the law is, or should be, is not consistent with recognized standards for an expert witness. The Defense request suggests that the Commission and its members lack the ability to understand the evidence, the issues, or render its legal and factual determinations on mixed questions of law and findings of fact.

nnn. Both federal and state law generally prohibits the trial testimony of lawyers, such as [redacted] regarding the law. In *Sprecht v. Jensen*, 853 F.2d 805 (10th Cir. 1988), cert. denied, 488 U.S. 1008 (1989), the court reversed the trial court's decision to allow a lawyer to testify in a civil rights action because the lawyer's testimony consisted only of legal conclusions which supplanted the trial roles of both the court and jury. The *Sprecht* court, citing the law in several other Circuits, held that "an expert witness may not give an opinion on ultimate issues of law" for at least two reasons. *Id.* at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. *Id*. at 807. Secondarily, the trial process is such that if one side calls an expert on the law, the other will do so as well. The result is an inefficient process with lengthy testimony of multiple contradictory experts on a matter within the domain of the Court itself. *Id.* at 809.

ooo. Similarly, the states have followed the federal courts in barring attorney experts on the law. *See Summers v. A.I. Gilbert CQ.*, 69 Cal. App. 4th 1155; 82 Cal. Rptr. 2d 162 (1999) ("California is not alone in excluding expert opinions on issues of law....At least seven circuit courts have held that the Federal Rules of Evidence prohibit such testimony."). *Id.* at 1179.

ppp. Moreover, a U.S. Appellate Court explicitly warns that over-reliance on opinions of academics can lead to incorrect conclusions about the actual content of customary law. *United States v. Ramzi Ahmed Yousef*, 327 F.3d 56, at 69-70 (2d Cir. 2003). This court stated, "scholars do not make law, and that it would be profoundly inconsistent with the law-making process within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law." *Id.* at 77; *see also Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

qqq. Consistent with U.S. holdings, the International Criminal Tribunal for the former Yugoslavia (ICTY) has disallowed expert testimony that interferes with the very role of the court itself. In *Kordic and Cerkez* (a matter involving Law of War violations before the ICTY) the Trial Chamber would not permit an expert to offer testimony that included legal conclusions. Such testimony elevated the witness to the status of a "fourth judge." The Chamber denied the request, concluding that such testimony would impermissibly provide an opinion "on the very matter upon which this Trial Chamber is going to have to rule" and that doing so "invades the right, power and duty of the Trial Chamber to rule upon the issue." *Kordic and Cerkez*, IT 95-l4/2-T, Transcript (January 28, 2000) at 13288-90,13305-07. Furthermore, the Chamber concluded, "it's dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value." *Id.* (emphasis added).

rrr. In sum, the production of [redacted] should be denied and his testimony excluded because this witness' testimony, in regard to the mixed legal and factual issues in this case, if allowed, would encroach upon the ultimate purpose and providence of the Commission.

sss. The Prosecution and the Defense are lawyers, and have already made their arguments on this issue to the Military Judge (with the assistance of law review articles penned by members of academia, including [redacted] . It is now up to the Military Judge to determine the appropriate instructions for the members. [redacted] testimony has no place in this military commission.

[redacted]

ttt. The Defense request for [redacted] contained no explanation of how her testimony was relevant and necessary. Indeed, it only stated that **"[t]he Government has previously denied this request.**" It is beyond dispute that such a statement fails to establish why the witness is relevant and necessary.

uuu. In the motion, the Defense provides the following synopsis and argument for [redacted] production:

> [redacted] conducted the autopsy of the decedent, Christopher Speer. She is expected to te stify about the m anner and cause of death of Christopher Speer. [redacted] is a retired m ilitary officer who is subject to com pulsory process. The de fense must be able to question this witness about her finding under oath.

vvv. In conversations with the Defense on Wednesday, 21 July 2010, Lieutenant Colonel Jackson indicated that he had never spoken with [redacted] and asked whether the Government knew how to contact her. The Defense did not request the Government's assistance in locating [redacted]

www. Nevertheless, the Defense now wants the Government to produce [redacted] at trial, notwithstanding the fact that the Defense has no idea what she will say during her testimony. The Defense essentially proposes conducting a witness interview on the stand. This is clearly improper and not supported by the Rules for Military Commission.

xxx. The Defense was provided all of the medical records related to Sergeant First Class Speer's autopsy immediately after counsel was assigned to the case. (The materials were discovered to previous counsel in 2006). At no point from the inception of this case until 21 July 2010 has Defense Counsel, to include current counsel, requested to speak to [redacted] or requested the Government's assistance in locating her and arranging an interview.

yyy. Moreover, in September 2008, the Convening Authority approved a forensic pathologist [redacted]) to assist the Defense and provide testimony specifically regarding the cause of death of Sergeant First Class Speer. As previously indicated, when the Government recently contacted [redacted], he indicated that he had not been contacted by the current Defense team and had not spoken to anyone in the Defense for over a year.

zzz. Indeed, [redacted] *might* have relevant and necessary testimony; however, that is not the standard. The Defense is required to provide a synopsis of the expected testimony in sufficient detail to show how the testimony is relevant and necessary. They have not done so; therefore this request should be denied.

7. **<u>Conclusion</u>:** A review of the record in this case demonstrates that that Government has been abundantly reasonable in granting Defense requests for witnesses. The Government has applied the standard liberally and granted witnesses where appropriate. What the Government has not done, and refuses to do, is to permit the Defense to interview witnesses on the stand or grant witnesses requests absent a proper showing as required by the Manual for Military Commission. The Government

respectfully requests that the Military Judge enforce that same standard and grant the Defense relief consistent with what the Government has proposed herein.

8. Oral Argument: The Government respectfully requests the Military Judge issue a ruling regarding the motion as soon as possible. The Defense "waive[d]" oral argument and "the right to call witnesses" except as to [redacted] To be clear – the Defense does not have a right to call witnesses or present evidence on the subject motion. Rather, the decision whether or not to hear oral argument on written motions is a matter within the Military Judge's discretion. *See* MRE 905(h). Nevertheless, it is not necessary to conduct oral argument on the motion to produce [redacted] or to hear testimony, presumably from [redacted] The Defense hasn't indicated what testimony [redacted] would provide, but considering the posture of the motion, presumably he would testify that the Military Judge should permit him to testify at trial about the law. The Defnese proffer already indicates what [redacted] would say at trial; there is no need for [redacted] to testify regarding why he should be able to say it. This, like the proposed trial testimony of [redacted] invades the province of the Military Judge; therefore, the request for this testimony, and oral argument on the matter should be denied.

9. Witnesses and Evidence: The Government offers the following evidence in support of its motion:

A. 11 June 2010 Defense Witness Request;

B. 22 June 2010 Government Response to Defense Witness Request;

C. 5 July 2010 Draft Motion to Compel Production of Witnesses;

D. 22 July 2010 Defense Request for Production of Witnesses; and

E. 23 July 2010 Government Response to Defense Witness Request.

10. Submitted by:

//s//

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Trial Counsel		Assistant Trial Counsel

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Chief Prosecutor	Assistant	Trial Counsel
Assistant Trial Counsel		

UNITED STATES OF AMERICA	D-118
v.	**Defense Reply to Government Response to Defense Motion for Appropriate Relief**
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khali"	to Compel Production of Witnesses at Trial
	Dated: 28 July 2010

1. Timeliness: This Reply is timely filed.

2. Relief Sought: Detailed defense counsel for Mr. Khadr respectfully requests this Commission grant the Defense's motion to compel the requested witnesses, in person, for the accused's trial.

3. Facts:

a. On 11 June 2010, the Defense provided a list to the Government outlining 45 witnesses requested for trial. As indicated by the government, this list was "largely verbatim to the original witness request submitted by previous defense counsel." The listed witnesses had been consistently requested by the Defense since September and November 2008.

b. Following the withdrawal of civilian counsel, detailed military counsel's counsel status changed. (*See* MCA §949c(b)(4)). Once detailed counsel's role was clarified by competent advisors, counsel submitted an updated witness request for trial. That list removed 20 witnesses and added only 3 that were not the subject of previous requests.

c. This Commission has previously ordered the production of two witnesses subject to this motion. Mr. C and Soldier #2 were the subjects of D-095 and D-096 respectively and ordered produced on 16 December 2008. Soliders #3, #5, #7 were also the subject of D-096 but argument was not necessary on that motion as the Government agreed to produce those witnesses on 11 December 2008. The order of 16 December 2008 has not changed.

4. Law and Argument:

The Defense has requested witnesses who are relevant and necessary to the presentation of an adequate defense. As such, the recent request provided to the

Government is vastly more limited than initially sought by previous counsel. The request provided by detailed counsel leaves only those witnesses that are essential to protect Mr. Khadr's rights at trial and sentencing. Further, and contrary to the government's assertions, the Defense has a good faith belief in the relevance and necessity of these witnesses.

While testimony via remote means (hereinafter VTC) is contemplated by the Rules for Military Commission (RCM), the RCM requires the military judge to balance "all probative factors" in determining the appropriateness of remote means. RMC 703(c)(3). Mere request by the Government is not sufficient as the RMC provides for VTC testimony only when "presence at trial cannot be procured by legal process." RMC 914A(a), MCRE 611(d)(3). RMC 703(e) outlines the process for subpoena of both military and civilian witnesses and provides for warrants of attachment should a witness neglect or refuse to appear. The Government, therefore, should be required to demonstrate that the process to compel a witness pursuant to RMC 703 has been attempted when balancing a request for testimony via VTC.

Further, there is significant value in the members viewing a witness testify in person that is lost with the use of VTC. The trier of fact must have the opportunity to assess the credibility, the demeanor, the tone of voice in person. The fact that the Defense agreed to the use of VTC for certain witnesses at the pre-trial suppression hearing should not be the standard used in assessing whether it is appropriate at trial. The pre-trial hearing was outside the presence of the members.

a. Interrogator #1: Interrogator #1 was Mr. Khadr's primary interrogator, and his testimony is relevant and necessary to both the merits of this case and to sentencing. Interrogator #1 was present for the first interrogation, and he will testify that Mr. Khadr was sedated and fatigued during this initial interrogation. He will further testify that, in order to elicit information from Mr. Khadr, he told Mr. Khadr a false story about the rape of a detainee who was under interrogation. Further, his testimony may rebut the Government's numerous FBI witnesses that will testify, in person, about Mr. Khadr's admissions.

The Government acknowledges the relevance and necessity of Interrogator #1 in the response to the Defense motion to compel by stating "The Government has agreed to produce Interrogator #1 via VTC." (page 10). The Government contends that Interrogator #1 "is not willing to travel to GTMO." *Id*. The Defense recognizes that travel to GTMO is inconvenient, however the Defense did not choose the forum for this trial. Personal inconvenience alone is an improper basis for denying a relevant and necessary witness. The Government has not shown it has been unable to procure Interrogator #1's testimony via legal process. The Government has made arrangements for its own witnesses to be present in person, despite the likely inconveniences they will experience in attending the trial. No lesser standard applies to Mr. Khadr's request for witnesses. *See* RMC 701(j); UCMJ Art. 46.

b. Interrogator #2: Interrogator #2 was present for the first interrogation of Mr. Khadr. He will testify that Mr. Khadr was sedated and fatigued during the initial interrogation. The government claims that the defense has not indicated how Interrogator #2's testimony will assist the trier of fact. The defense asserted that Interrogator #2's testimony will assist the trier of fact in determining a material issue in this case – the reliability of Mr. Khadr's interrogations. This interrogation formed the basis for all subsequent interrogations and the trier of fact is entitled to hear of the circumstances surrounding that interrogation from percipient witnesses, to assess the reliability of and weight that should be given to statements the government introduces from Mr. Khadr. As such, Interrogator #2's testimony is relevant and necessary. Again, the Government has made arrangements for its own witnesses to be present, in person, to testify about statements made by Mr. Khadar. No lesser standard applies to Mr. Khadr's request for witnesses. *See* RMC 701(j); UCMJ Art. 46.

c. Interrogator #3: Interrogator #3 will testify that he was present for interrogations of Mr. Khadr at Bagram. He was a percipient witness to the interrogation tactics employed by Interrogator #1 with Mr. Khadr, tactics which included threats of rape. He will corroborate the testimony of Interrogator #1, therefore his testimony is necessary and relevant to the trier of fact's assessment of the reliability of and weight that should be given to Mr. Khadr's statements, which the government intends to admit against him through the use of in person testimony.

d. Mr. C: Mr. C was ordered produced by this Commission on 16 December 2008. The order has not been changed and the relevance of his testimony for trial and sentencing has not changed since that time. In spite of that order, the Government is refusing to produce Mr. C for trial.

Mr. C will testify about his interactions with Mr. Khadr during his time at the [redacted] in Afghanistan; about the first interrogation of Mr. Khadr which took place in a hospital at Bagram; and he will explain the conditions of confinement at the [redacted]. These matters are critical for the members to hear in order for them to assess the reliability of and weight that should be given to the statements taken from Mr. Khadr during this time period. This assists the trier of fact in assessing the reliability of the Government's evidence. As a direct witness to the conditions of Mr. Khadr's confinement, Mr. C's testimony is also relevant and necessary to lay the appropriate foundation for the testimony of the Defense's expert witnesses. Further, Mr. C's testimony will also assist the trier of fact in determining an appropriate sentence. Without an understanding of the circumstances under which Mr. Khadr was hospitalized, confined, and interrogated, the members will be unable to evaluate relevant facts, and Mr. Khadr will be denied a fair trial and/or sentence. His personal presence is necessary so that the members can properly assess the credibility of any testimony he will offer. Such assessment is not fairly possible via VTC, particularly in view of Mr. C's specific background, which involves a conviction for his conduct during detention operations at Bagram and the fact the Government's witnesses will be testifying in person in GTMO.

e. Soldiers #2, 3, 5, 7 & 8: The Government has acknowledged the relevance and necessity of Soldiers #2, #3 and #7 by recommending the witnesses production. The Government is attempting to limit the testimony of Solider #3 to VTC. The Government is denying the production of Soliders #5 and #8.

All the above-numbered Soldiers were all present during the firefight. Although the Government contends that only ten soldiers are required to adequately describe the events of the firefight, each of these individuals have their own unique viewpoint of the details including, but not limited, to alternative sources of the grenade. The trier of fact must have access to this evidence – the very evidence that gives rise to the gravest charge in this case, the charge of murder. The government cannot be allowed to present its monolithic version of facts, and thereby obfuscate details from the jurors.

The Government has not shown it has been unable to procure Soldier #3's testimony via legal process. The Government has made arrangements for its own witnesses to be present in person, to testify about the firefight. No lesser standard applies to Mr. Khadr's request for witnesses. *See* RMC 701(j); UCMJ Art. 46.

f. [redacted]: The Government acknowledges the relevance and necessity of Mr. [redacted] testimony by agreeing to produce him via VTC. The Government has not shown, however that it is unable to procure his testimony via legal process. While it is understandable that travel to GTMO is inconvenient, Mr. [redacted] testimony is critical to assess the scene of the alleged murder in this case. He will testify that when he entered the compound after the ground assault, two "enemy combatants," including Mr. Khadr, were alive. Mr. [redacted], moreover, prepared a report documenting the events shortly after the firefight and the defense requires him to testify in person in order to introduce that report into evidence and/or refresh his recollection, if necessary. The ability to do so is hindered if the testimony is remote. The government has arranged its own fact witnesses to be present in Guantanamo, notwithstanding undoubted competing commitments those witnesses have. The same arrangement can be made for this defense requested witness.

The government contends that Mr. [redacted] "professional and personal commitments" make it difficult for him to attend the trial in person. The government fails to explain how "the nature of his employment," creates a "security risk" for Mr. [redacted] travel to Guantanamo. The defense notes that, over the course of recent years, various Secretaries of Defense, Attorneys General, and other high-ranking government officials have traveled to Guantanamo without incident; it is therefore difficult to comprehend how Mr. [redacted] particular presence in Guantanamo is a singular security risk. Furthermore, in that the government – and not the defense – selected the venue of this trial, the defense cannot be penalized because of logistical difficulties the government encounters in ensuring the presence of witnesses in this venue. The defense also would suggest that Mr. [redacted] professional commitments include being present to testify in a military commission case in which his professional involvement relates directly to the prosecution of the case.

g. [redacted]**:** Mr. [redacted] is expected to testify concerning the substance of exculpatory statements made by Mr. Khadr to Canadian interrogators in 2003, and the circumstances of Mr. Khadr's detention in 2004, including Mr. Khadr being subject to prolonged sleep deprivation under the so-called [redacted] in GTMO. That this witness possesses exculpatory information renders his testimony both relevant and necessary for the trial as well as sentencing.

The Defense is unable to control the source of exculpatory evidence. However, once identified it is crucial to the fairness of Mr. Khadr's trial that he be afforded the opportunity to present that evidence at trial. Exculpatory evidence may negate or reduce his guilt under the charged offenses or mitigate a possible sentence. The Government did not indicate the steps taken to request Canada produce Mr. [redacted] for testimony but merely indicated the Government was unaware of a means to compel attendance.

h. Prof. [redacted]**:** At present there is no ruling on either P-009 or D-115 and, as the Government recognizes, there are "mixed legal and factual issues in this case." (page 20). Accordingly, the Defense must prepare for the possibility, albeit an unusual one, that a witness may be required to testify about the meaning of the phrase "in violation of the law" either before or after the upcoming trial. Further, since the submission of the Defense's witness request, the Government has filed P-028, a motion seeking to amend the charges to include the phrase "hostilities" vice "armed conflict." As such, the Defense will need to present factual rebuttal evidence relating to the commencement, existence and/or conclusion of hostilities in Afghanistan as they relate to the charges in this case. Professor [redacted] will be able to testify about such facts that are directly relevant to the trier of fact in determining the parameters of the hostilities. Recognizing that Professor [redacted] relevance is dependent upon the evidence yet to be established, the Defense offered to accept his testimony via VTC in order to save some expense for the Government.

i. Dr. [redacted] Dr. [redacted] is a relevant and necessary mitigation witness and will testify that Mr. Khadr possesses strong rehabilitative potential. She will testify that her university is willing to accept Mr. Khadr as a student upon his release, that he would have assistance with tuition and other necessary support to help him acclimate to life outside Guantanamo. Effectively, her testimony will demonstrate to the members that Mr. Khadr would be released with a support network, and thus that his reintegration into society would be assured – fundamental mitigation evidence that Mr. Khadr is entitled to present. *See* RMC 1001(c).

j. Dr. [redacted] Dr. [redacted] was the forensic pathologist who actually performed the autopsy of SFC Christopher Speer. Dr. [redacted] will testify that she did not remove any ballistic material from SFC Speer for testing. The defense seeks to present testimony from the pathologist who herself performed the autopsy, so that the details of the autopsy can be fully revealed, rather than merely have a report admitted through another member of the same laboratory.

5. **Conclusion:** It is vital to note that, in order to afford Mr. Khadr an adequate defense, the members be permitted to hear from all necessary and relevant witnesses who can convey the circumstances of Mr. Khadr's interrogations. Limiting the defense to a single witness, or to witnesses only via VTC, undermines the defense case and precludes the members from properly assessing the in person credibility of these witnesses, and giving such evidence the weight the members see fit. The procedure for requiring the defense to first request witnesses through the prosecution does not grant the prosecution a right to refuse for strategic advantage, nor does it allow the prosecution to levy its own, or witnesses' convenience, as a basis for denying witness requests. The defense respectfully requests that this Commission grant the above-referenced witnesses.

Respectf ully submitted,

/s/

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UNITED STATES OF AMERICA	)	**RULING**
	)	
	)	**Defense Motion to**
v.	)	**Compel the Production**
	)	**of Witnesses**
	)	
OMAR AHMED KHADR	)	**D-118**
a/k/a "Akhbar Farhad"	)	
a/k/a "Akhbar Farnad"	)	
a/k/a "Ahmed Muhammed Khali"	)	

1. The Defense requests the Commission compel the production of certain witnesses for trial on the merits. The Government opposes this motion in part. The Government waived oral argument. The Defense waived oral argument for all witnesses except as to Professor [redacted]

2. The Commission's ruling is as follow:

a. Mr. [redacted] The motion to produce Mr. [redacted] is granted. However, he may testify via video-telephone conference (VTC).

b. Interrogator #1: The motion to produce Interrogator #1 is granted. Interrogator #1 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

c. Interrogator #2: The motion to produce Interrogator #2 is granted. Interrogator #2 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

d. Mr. C: During the suppression hearing Mr. C testified that he never heard or witnessed any abuse of the accused. Mr. C testified that personnel generally were more friendly to the accused than other detainees because of the accused's age. Most of the testimony of Mr. C concerns the alleged treatment of detainees other than the accused.

The accused, in his affidavit, makes a number of allegations concerning his treatment at the hands of interrogators. The Commission admitted the accused's affidavit for the sole purpose of the suppression hearing pursuant to Military Commission Rule of Evidence 104(a). The Commission will give it, along with all the other evidence, the weight the Commission believes it deserves when it rules on the suppression motion. However, the Commission has not admitted the accused's affidavit for the merits portion of the trial.

It appears the Defense believes that Mr. C would be able to help corroborate the allegations the accused makes through testimony of how detainees other than the accused were treated. If the accused's allegations of mistreatment are before the court members in an admissible form of evidence, Mr. C's testimony becomes relevant and necessary. Until the allegations the accused makes in his affidavit are before the court members in

an admissible form of evidence, the Commission finds Mr. C's testimony is not relevant or necessary.

Accordingly, the Government will make arrangements for the testimony of Mr. C. However, the Commission will not order Mr. C to testify in person or via VTC until the accused's allegations in his affidavit are before the court members in an admissible form of evidence.

e. Soldier #2: The motion to produce Soldier #2 is granted. Soldier #2 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

f. Soldier #3: The motion to produce Soldier #3 is granted. Soldier #3 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

g. Soldier #5: There are numerous witnesses testifying on what happened during and after the firefight in July 2002. The testimony of Soldier #5 is cumulative. The motion to produce Soldier #5 is denied.

h. Soldier #7: The motion to produce Soldier #7 is granted. Soldier #7 will testify in-person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

i. Soldier #8: There are numerous witnesses testifying on what happened during and after the firefight in July 2002. The testimony of Soldier #8 is cumulative. The motion to produce Soldier #8 is denied.

j. [redacted] The Defense has not talked to Mr. [redacted] The Defense has not proffered the substance and circumstances of the statements the accused made to Mr. [redacted] which would allow the Commission to determine if they are exculpatory and admissible under Military Commission Rule of Evidence 803. The motion to produce Mr. [redacted] is denied.

k. Interrogator #3: The motion to produce Interrogator #3 is granted. Interrogator #3 will testify in- person unless the Government justifies his testimony via VTC in accordance with R.M.C. 703(c)(3).

l. Dr. [redacted]: The testimony of this witness relates solely to sentencing and would be admissible under R.M.C. 1001(c)(1)(B). The Defense has not shown how the in-person testimony of this witness is necessary under R.M.C. 1001(e)(2). If there is a sentencing hearing, the Government will arrange for the testimony of Dr. [redacted] via VTC.

m. Professor [redacted]: The Defense did not waive oral argument for the production of this witness and did not waive calling this witness for the purpose of this motion. The Commission finds that an evidentiary hearing and oral argument would not be helpful for the determination of this motion. See R.M.C. 905(h). The Defense is certainly entitled to argue to the Commission what it believes the law is and may cite

authority as it deems appropriate as is done in any brief submitted to the Commission. The Commission instructs the court members as to the law. The court members are required to follow the law as the Commission instructs, not as a law professor opines. The motion to produce Professor [redacted] is denied.

n. Dr. [redacted]: It is not clear that the Defense has talked to Dr. [redacted] in order to have a sufficient basis to provide a synopsis of her expected testimony. The Defense has not explained how the testimony of Dr. [redacted] is necessary to its case. The motion to produce Dr. [redacted] is denied.

So Ordered this 29th day of July 2010.

Patrick J. Parrish
COL, JA
Military Judge